

217255

BEFORE THE SURFACE TRANSPORTATION BOARD



LINCOLN LUMBER COMPANY -)
PETITION FOR DECLARATORY ORDER -)
CONDEMNATION OF RAILROAD)
RIGHT-OF-WAY FOR A STORM SEWER)

FINANCE DOCKET NO. 34915

NOTICE OF INTENT TO PARTICIPATE

August 10, 2006

By UPS overnight mail

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW, Room 711
Washington, DC 20423

Dear Secretary Williams:

Please be advised that the City of Lincoln intends to participate as a Party of Record in the above captioned proceeding and requests that the undersigned be added to the official service list.

Enclosed is an original and 10 copies of the City of Lincoln's Reply requesting the Board not initiate a proceeding in the above referenced matter.

Respectfully submitted,

Joseph Rupp
Assistant City Attorney
575 South 10th Street, Suite 4201
Lincoln, NE 68508
(402) 441-7260 (telephone)
(402) 441-8812 (fax)
jrupp@ci.lincoln.ne.us

ENTERED
Office of Proceedings

AUG 11 2006

Part of
Public Record

Certificate of Service

I certify that the foregoing Notice of Intent to Participate was served on August 10, 2006, upon the following persons by first-class mail, postage pre-paid:

Lincoln Lumber Company
P.O. Box 30373
Station A
Lincoln, NE 68503

Thomas Ostdiek
13220 California Street, Suite 400
Omaha, NE 68154

Thomas McFarland
208 South LaSalle Street, Suite 1890
Chicago, IL 60604


Joseph J. Rupp

BEFORE THE SURFACE TRANSPORTATION BOARD

LINCOLN LUMBER COMPANY -)
PETITION FOR DECLARATORY ORDER -)
CONDEMNATION OF RAILROAD)
RIGHT-OF-WAY FOR A STORM SEWER)

FINANCE DOCKET NO. 34915

REPLY

CITY OF LINCOLN, NEBRASKA,
A Municipal Corporation

DANA W. ROPER, City Attorney
JOSEPH J. RUPP, Assistant City Attorney
575 South 10th Street
Lincoln, NE 68508
(402) 441-7260

DATE FILED: August 11, 2006

BEFORE THE SURFACE TRANSPORTATION BOARD

| | | |
|----------------------------------|---|--------------------------|
| LINCOLN LUMBER COMPANY - |) | |
| PETITION FOR DECLARATORY ORDER - |) | FINANCE DOCKET NO. 34915 |
| CONDEMNATION OF RAILROAD |) | |
| RIGHT-OF-WAY FOR A STORM SEWER |) | |

REPLY

Lincoln Lumber Company has filed a Petition requesting that the Board declare the condemnation by the City of Lincoln of portions of land in LLC's right-of-way for a storm sewer federally preempted under 49 U.S.C. 10501(b). The issue of whether the City's storm sewer would materially interfere with LLC's railroad operations or compromise safety has already been before the Surface Transportation Board. The City requests that the Board not initiate another proceeding to determine an issue identical to the one raised in a prior proceeding. The City's plans for the storm sewer have not changed and LLC did not oppose the storm sewer plans in the prior proceeding. If the Board does initiate a proceeding, the City asks the entire prior proceeding be reexamined and the Board declare that the City's recreational trail is not federally preempted.

On November 12, 2003, the City filed a petition with the Board for an order declaring that its acquisition by eminent domain of portions of LLC's railroad right-of-way for a recreational trail and storm sewer would not be federally preempted under 49 U.S.C. 10501(b). In the case before the Surface Transportation Board, Lincoln Lumber Company filed a Reply in Partial Opposition to Petition for Declaratory Order and submitted evidence. Based upon representations made by Lincoln Lumber Company, the Board determined that the recreational trail was federally preempted because it caused undue interference with railroad operations.

Lincoln Lumber Company did not oppose the City's proposal to place an underground storm sewer in the right-of-way. In their Reply, Lincoln Lumber Company stated it was "not opposed to the City's proposal for improvements to the storm sewer, assuming adequate compensation is paid for taking the land." Further, Lincoln Lumber Company stated that although the project would be "temporarily disruptive during construction, the sewer, being underground, would have minimal effect on safety and rail utilization of the surface of the ROW." In the STB order of August 12, 2004, after declaring the recreational trail federally preempted, the Board concludes "LLC states that it does not oppose the City's proposal to place an underground storm sewer in the right-of-way." City of Lincoln - Petition for Declaratory Order, 2004 STB Lexis 508 (Finance Docket No. 34425, served Aug. 12, 2004).

The City of Lincoln filed a Petition for Review of the Board's decision to the United States Court of Appeals for the Eighth Circuit. The City sought to overturn the Board's decision that the recreational trail was federally preempted. In the City's Petition for Review, it also sought clarification of the Board's action regarding the storm sewer project. Lincoln Lumber Company was also a party during the review of the Surface Transportation Board's decision before the Eighth Circuit. Lincoln Lumber Company intervened and presented a brief in support of the Board's decision. The Board response was that there was "no need to rule on the storm sewer project because there was no dispute and that it is well established that nonconflicting, nonexclusive easements across railroad property are not preempted if they do not hinder rail operations or pose safety risks." City of Lincoln v. Surface Transportation Board, 414 F.3d 858, 863 (8th Cir. 2005).

ARGUMENT

The City's storm sewer project does not unreasonable interfere with LLC's operations and/or pose safety risks. The plans for the storm sewer are the same plans presented in the previous litigation, as supported by the verified statement of Benjamin Higgins, which is attached to this Reply as Appendix A. A copy of the plans were submitted into evidence before the Surface Transportation Board. Those plans showed the location and design of the storm sewer as it related to Lincoln Lumber Company's property. Lincoln Lumber Company did not object to the storm sewer plans in the prior proceeding. As stated, LLC declared that the storm sewer will have "minimal effect on safety and rail utilization of the surface of the ROW." Lumber Company now petitions the Board to initiate a proceeding so that it may take a completely opposite position.

Lincoln Lumber Company argues that the City's storm sewer easement unduly impedes railroad operations and safety because it runs longitudinal with the railroad lines rather than perpendicular. This argument was not raised before the STB in the prior proceedings despite the fact that LLC was completely and utterly aware of the route for the storm sewer at that time. The City has never represented that the storm sewer would run perpendicular nor has Lincoln Lumber Company ever made such a request. Nothing has changed since Lincoln Lumber Company's prior statements to the Board. Lincoln Lumber Company should not be allowed to use judicial resources once again and cause the City the time and expense of relitigating issues that have been or could have been previously adjudicated. Lincoln Lumber Company had a full and fair opportunity to object to the storm sewer project during the previous litigation.

Lincoln Lumber Company alleges the City somehow induced its support on the storm sewer project by indicating that it would work with LLC to minimize interference and safety concerns. LLC claims the City has failed to live up to those representations. Essentially, LLC's

president, Mr. Hamill, has demanded to design the public project to his liking, adding significant improvements to the Lincoln Lumber Company property. Absent the City's willingness to turn over design and control of the project, LLC is determined to prevent the project. However, the City cannot abdicate its public purpose obligation by allowing Lincoln Lumber Company or Mr. Hamill to design the storm sewer project.

The City did, in fact, represent that it would work with Lincoln Lumber Company to minimize disruptions to its business during construction and that the storm sewer design would allow continued rail operations. The City has remained true to its representations. The storm sewer plans as submitted to the Board allow continued rail operations. It is fundamentally inconsistent to state that underground improvements cause interference with an above ground railroad operation. Further, the City has agreed to avoid interfering with the activities of LLC's employees during construction.

The City has attempted, in good faith, to work with LLC to regarding the storm sewer project. As apparent from the United States District Court's Order, the parties have attempted to negotiate an agreement over the easements. Although an agreement was never finalized and executed, the City was willing to make some changes to the storm sewer at the request of Mr. Hamill, even though the City believed the changes to be unnecessary. Specifically, the City has agreed to: extend an inlet pipe in Whittier Street; connect one of LLC's drainage pipes to the storm sewer; avoid interfering with the activities of LLC's employees; allow LLC to cover the storm sewer with more soil and rock; not disturb any buildings in the temporary easement area; and repair any of LLC's property damaged by the City during the construction, maintenance, repair or replacement of the storm sewer. As to the remaining disputes between the parties, the City has agreed to use a contractor experienced in railroad work to remove and replace a spur

track and to fulfill LLC's request of adding a storm water inlet near LLC's railroad switch. The primary, possibly sole, dispute between the parties is liability language. As the United States District Court held, the dispute over insurance and indemnification language involves the allocation of risk, not the regulation of rail transportation. Recently, the City sent a letter to LLC, which is attached to the Petition as Appendix B, stating it was still willing to make these changes despite the failure to reach an agreement. Lincoln Lumber Company's sent a letter in response and the City replied, both letters are attached in Appendix B.

A federal court has already determined that the City's storm sewer project is not federally preempted. In Maumee, the STB stated that courts can, and regularly do, make determinations as to whether proposed eminent domain actions would impermissibly interfere with railroad operations. Maumee & W. R. R. Corp. and RMW Ventures, LLC - Petition for Declaratory Order, 2004 WL 395835 (Surface Transp. Bd. Mar. 2, 2004). Lincoln Lumber Company attempted to remove this case from County Court to the United States District Court alleging federal question jurisdiction based upon the federal preemption issue. The City of Lincoln filed a Motion to Remand and both parties presented extensive evidence on past litigation between the parties and the negotiations over the easement. The United States District Court, in an order dated May 23, 2006, found that Lincoln Lumber Company failed to prove that the City's project was preempted. City of Lincoln v. Lincoln Lumber Company, No. 4:06CV3046. The case was remanded because, absent a federal preemption question, the District Court lacked jurisdiction. Therefore, the Board should not institute another proceeding for a determination on the issue of federal preemption. The United States District Court has already determined the storm sewer easement is not preempted.

The City requests that in the event the Board reconsiders the issue of the storm sewer project, it should also reopen proceedings regarding the recreational trail. Although the Board should not initiate a proceeding regarding the storm sewer, if it does so, the City should also be able to relitigate matters previously before the Board. The City's need for the recreational trail has not changed. The route of the recreational trail through LLC's property is vital to connect existing trails. This recreational trail will provide an important link for bicyclist and pedestrians journeying between the University of Nebraska - Lincoln's downtown campus and its East campus. Further, this trail will link downtown Lincoln with the Mo Pac East Trail (former Missouri Pacific railroad corridor), which extends from the east side of Lincoln to Omaha.

WHEREFORE, the Board should refuse to initiate a proceeding in response to LLC's Petition, or if a proceeding is initiated, reopen the issue of federal preemption of the recreational trail.

Respectfully submitted,

CITY OF LINCOLN, NEBRASKA,
A Municipal Corporation

DANA W. ROPER, City Attorney
JOSEPH J. RUPP, Asst. City Attorney

By: 

Joseph J. Rupp, #22753
Assistant City Attorney
575 South 10th Street
Lincoln, NE 68508
(402) 441-7260

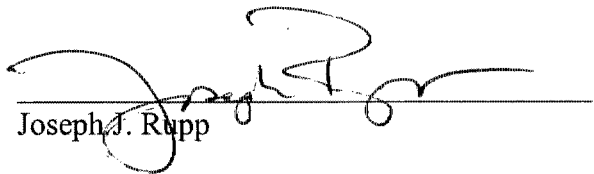
Certificate of Service

I certify that the foregoing Reply was served on August 10, 2006, upon the following persons by first-class mail, postage pre-paid:

Lincoln Lumber Company
P.O. Box 30373
Station A
Lincoln, NE 68503

Thomas Ostdiek
13220 California Street, Suite 400
Omaha, NE 68154

Thomas McFarland
208 South LaSalle Street, Suite 1890
Chicago, IL 60604


Joseph J. Rupp

APPENDIX “A”

BEFORE THE SURFACE TRANSPORTATION BOARD

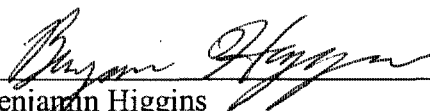
LINCOLN LUMBER COMPANY)

F.D. 34915

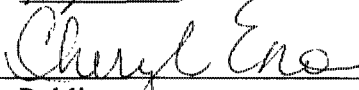
PETITION FOR DECLARATORY ORDER)

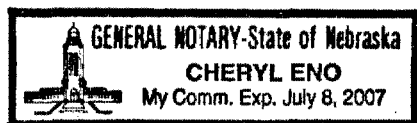
I, Benjamin Higgins, make this Verified Statement for use on behalf of the City of Lincoln in the above-captioned proceeding based upon personal knowledge and reliable facts reported to me.

1. That I am a Senior Engineer in the Watershed Management Division of Public Work & Utilities for the City of Lincoln.
2. That I am supervising engineer of the Storm Sewer Project 701-321, X Street, 19th Street to 26th Street. That said Storm Sewer Project requires the acquisition of an easement across property owned by Lincoln Lumber Company.
3. That the plans for the Storm Sewer Project submitted with the City's Petition for Declaratory Order and filed with Surface Transportation Board have not changed as to Lincoln Lumber Company's property (with the exception of those changes requested by Lincoln Lumber Company and agreed to in the City's letter of July 17, 2006). With the exception of those changes requested by LLC and agreed to by the City, the storm sewer on Lincoln Lumber Company's property will be constructed in accordance with the plans previously submitted. Further, the City of Lincoln will comply with the representations made in the verified statement of Brian Kramer and submitted to the Surface Transportation Board.
4. That I am familiar with Lincoln Lumber Company's requested changes to the storm sewer plans. That said change are unrelated to the storm sewer and are betterments or improvements to Lincoln Lumber Company's property. That said changes are unnecessary for railroad safety or operations.
5. That the City has attempted in good faith to work with Lincoln Lumber Company and has offered to make some of its requested changes. However, these changes are not required for the project to proceed. For example, the City has offered to extend an underground inlet pipe and install an additional underground inlet. The City has made these offers in an effort to amicably resolve this matter; they are unnecessary for railroad safety or operation.


Benjamin Higgins

Subscribed and sworn to before me this 9 day of August, 2006.


Notary Public



APPENDIX “B”

BEFORE THE SURFACE TRANSPORTATION BOARD

LINCOLN LUMBER COMPANY)
)
PETITION FOR DECLARATORY ORDER)

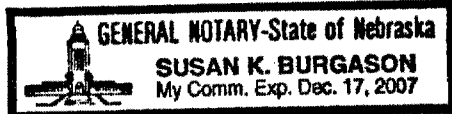
F.D. 34915

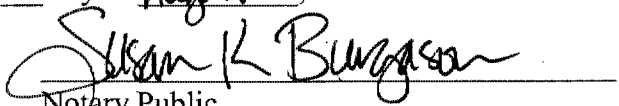
I, Joseph J. Rupp, make this Verified Statement for use on behalf of the City of Lincoln in the above-captioned proceeding based upon personal knowledge and reliable facts reported to me.

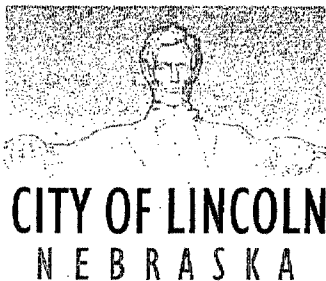
1. My name is Joseph Rupp and I am an Assistant City Attorney for the City of Lincoln, Nebraska.
2. I sent a letter to Lincoln Lumber Company's attorney, Tom Ostdiek, on July 17, 2006, indicating the City was still willing to make changes requested by LLC despite the failure to reach an agreement over the easement (copy attached as Exhibit 1).
3. That on July 21, 2006, I received a response from Mr. Ostdiek indicating Lincoln Lumber Company would like the City to make those concessions discussed in my letter but also wanted additional changes (copy attached as Exhibit 2). Many of the requests in Mr. Ostdiek's letter were unrelated to the storm sewer.
4. I sent a letter to Mr. Ostdiek on August 9, 2006, in reply to Lincoln Lumber Company's new requests (copy attached as Exhibit 3). In that letter, I reiterated that LLC is free to use the permanent easement for railroad or other surface uses except the construction thereon of permanent buildings.


Joseph J. Rupp

Subscribed and sworn to before me this 9th day of August, 2006.




Notary Public



Law Department 402-441-7281
Dana W. Roper, City Attorney
575 South 10th Street
Suite 4201
Lincoln, Nebraska 68508
Civil fax: 402-441-8812
Pros. fax: 402-441-8813

Ernest R. (Rick) Pro III, Chief Assistant; John C. McQuinn II, Chief Prosecutor
Richard C. Anderson, Police Legal Advisor
Civil Division
James D. Faimon
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Connor L. Reuter Margaret M. Blatchford
Tanya L. Skinner Joe J. Rupp
Prosecution Division
Patrick A. Campbell Christine A. Loseke
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Jessica Kerkhofs



MAYOR COLEEN J. SENG

lincoln.ne.gov

July 17, 2006

Tom Ostdiek
Fitzgerald Schorr Bartmettler
& Brennan, P.C., L.L.O.
13220 California Street, Suite 400
Omaha, Nebraska 68154

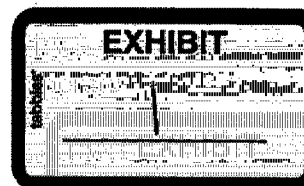
Re: Lincoln Lumber Company, CI 06-1034

Dear Tom:

I am in receipt of your letter of July 12, 2006 requesting a meeting with the City. As you know, the condemnation hearing on this matter has been rescheduled for August 18th. Although the City and Lincoln Lumber Company were unable to reach a final agreement during earlier negotiations (primarily due to LLC's insistence on liability language), the City is still willing to make many of Lincoln Lumber Company's requested changes. Specifically, the City is willing to:

- (1) Use a subcontractor who is experienced in working with railroad beds and tracks to do all work related to the removal and replacement of the railroad bed and track (already in existing specifications);
- (2) Replace or restore any track removed or otherwise disturbed during construction, installation, operation, maintenance or replacement of the Storm Sewer Improvements to a condition fully equal to that existing before said work commenced (already in existing specifications);
- (3) Extend the inlet pipe at Whittier Street. City agrees to cooperate with LLC to determine the appropriate length of the inlet pipe extension to allow LLC's construction of a retaining wall;
- (4) Connect to the Storm Sewer Improvements a drainage pipe that runs underneath LLC's office building located between 23rd Street and 24th Street from an inlet on the south side of such building to the North side of such building if LLC will extend the drainage pipe beyond the north side of its retaining wall; and
- (5) Install a stormwater inlet approximately 15 feet East of LLC's railroad switch (the agreement mistakenly states remove water inlet).

Of course the City does not believe any of these requested changes are necessary. The City is willing to make these changes and incur the additional expense thereof in an effort to cooperate



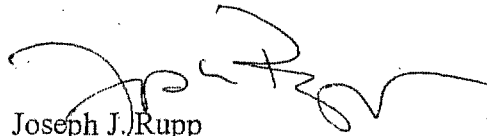
with LLC. Please let us know in writing by August 7, 2006 if you would like any or all of these changes incorporated into the engineer's plans and bid specification. In such case, the changes will be made prior to construction. If the City does not hear from you, we will assume the current plans are acceptable and make no changes.

In addition, City agrees that it will not occupy or otherwise disturb any existing building lying within the boundaries of the Temporary Easement, that it will cooperate with LLC and to use its best efforts to avoid interfering with the activities of LLC's employees, and will allow LLC to cover the Storm Sewer Improvements with soil and/or crushed rock fill to a depth required to create a level area after the storm sewer project is complete.

I am willing to meet with you on these matters but do not know that a meeting is necessary. I understand from our conversations that Lincoln Lumber Company has already installed a retaining wall between 23rd and 24th Street. That should remove any prior dispute regarding its design and the timing of its installation. Therefore, I believe the only remaining dispute between the City and LLC is liability language and a time table for construction. As previously stated, the City will require the contractor to carry Railroad Protective Liability Insurance. Further, the City will attempt to have the project complete within 90 days (specifications require 120 days). Construction is currently scheduled to start Spring 2007.

If I have failed to address something, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Rupp", written over the printed name.

Joseph J. Rupp
Assistant City Attorney

LAW OFFICES

FITZGERALD, SCHORR, BARMETTLER & BRENNAN, P.C., L.L.O.

JOSEPH J. BARMETTLER
GREGORY B. MINTER
BRUCE D. VOSBURG
ROBERT T. CANNELLA
GERALD L. FRIEDRICHSEN
NICK R. TAYLOR*
MICHAEL D. MATEJKA
FRANK J. MIHULKA
MATTHEW F. HEFFRON*
THOMAS L. SALADINO
THOMAS G. McKEON
SUSAN J. SPAHN
THOMAS R. OSTDIEK
CARLA HEATHERSHAW RISKO*
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WILLIAM A. TINSTMAN
ANDREW M. BATH
OF COUNSEL

WILLIAM J. BRENNAN
RETIRED

JAMES J. FITZGERALD, JR.
1903-1989

CHARLES A. SCHORR
1924-1998

July 19, 2006

RECEIVED
MO6-26441
JUL 21 2006
LAW DEPT.

*ALSO LICENSED TO PRACTICE IN IOWA

Mr. Joseph Rupp
Assistant City Attorney
575 South 10th Street, Suite 4201
Lincoln, Nebraska 68508

Re: Storm Sewer Project condemnation

Dear Joe:

I have talked to Don some more about what it would take for him to drop his opposition to the storm sewer plans and have shared the contents of your July 17, 2006 letter. While I believe the City's concessions bring us closer to resolving the differences, some issues remain.

You had asked about the type of structure Don wants to place on the right of way. Don wants a covered terminal so that loading and unloading operations can take place under all weather conditions. Although his initial plans were for a completely enclosed terminal, he is willing to build an open-wall structure with a roof – although he may enclose the north wall of the structure. My understanding is that it would be like a pole-barn type structure, which would span the tracks and much of the north side of the tracks. Ideally, he would like it to extend 25 feet south of the tracks, which will cover the easement area. It would be between 18 and 20 feet high, which should provide room to do maintenance or repair work on the sewer line if it became necessary.

From the time he first learned of the City's plans for the storm sewer, he has asked the City to consider pushing the sewer south so that it lies in the southern 25 feet of the right of way. Don's building and track operations could cover the north 75 feet of the right of way and he would use the 25 feet over the top of the easement to move his equipment and for unloading and storage of materials. Absent the City's willingness to move the sewer to the south, we are looking for the City to agree to allow the covered structure to be placed partially in the easement way.

Another issue is the covering of the sewer pipe, and the retaining wall on Whittier. Don is not concerned about the costs of covering the pipes and building the retaining wall, but he is concerned about potential liability if he takes on that work himself. If the City places the pipe on the ground and covers it with only a foot or so of dirt, it will not be adequately protected from damage due from Lincoln Lumber Company's equipment. Don is again asking that the City at least bury it with dirt to a



Mr. Joseph Rupp
July 19, 2006
Page - 2 -

level that the engineers are comfortable will protect it from LLC's activities. LLC will finish leveling with rock and handle landscaping of the area.

With respect to the retaining wall, Don states that the City and UNL have designed drainage in the area in a manner that brings a tremendous amount of water down Whittier Street onto the right-of-way. The City and the University also push snow up Whittier Street and onto the right-of-way. Don is concerned about potential liability if his retaining wall is not designed to adequately drain the water coming down Whittier. He would like to see the City design and build the retaining wall on top of Whittier. He will extend it to the East and West as necessary. Short of the City handling the construction of the wall, he requests the City's engineers provide assistance in assuring that whatever is placed there is appropriately designed and built to handle the water, and that the City agree that he is not responsible for future problems with water drainage problem created by the retaining wall.

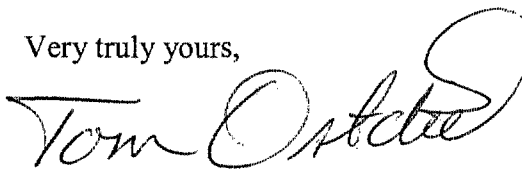
The foregoing does not address the liability issues and the existing storm sewer pipe on the North side of the tracks. Don is well aware that the company on the North side used CCA to treat wood, which is apparently a contaminant. The water flowed into the City's storm sewer, which no longer appears to lead anywhere, and is presumably leaching out under LLC's property. LLC wants the pipe dug up so that additional toxic matters are not deposited beneath its property.

For now, LLC would like to see a focus on the design of the project, including, in addition to the concessions identified in your letter, the City's willingness to move the pipe into the South 25 feet of the right-of-way. LLC is also asking the City to fill dirt over the pipe to a level required to protect it from LLC's equipment, allow placement of the terminal shelter and to construct (or assist in design and construction of a retaining wall along Whittier).

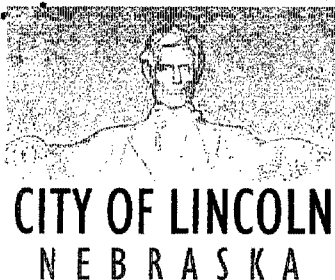
The last issue is the cement dock that apparently sits on top of the existing sanitary sewer. Don has asked that the City agree to remove the cement dock. Alternatively, Don is willing to move it at no cost to the City, if the City will agree to release Don from any liability for damage to the sewer resulting therefrom. We could limit the release of liability to exclude willful damage or gross negligence if you think that would help.

Please discuss these issues and let me know if there is any room for discussion. Thank you for your consideration of these matters.

Very truly yours,


THOMAS R. OSTDIEK
For the Firm

TRO:mjh
cc: Don Hamill



Law Department 402-441-7281
Dana W. Roper, City Attorney Civil fax: 402-441-8812
575 South 10th Street Suite 4201
Lincoln, Nebraska 68508 Pros. fax: 402-441-8813

Ernest R. (Rick) Peo III, Chief Assistant John E. McQuinn II, Chief Prosecutor
Richard C. Anderson, Police Legal Advisor
Civil Division James D. Faimon
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Tonya L. Skinner Joe J. Rupp
Prosecution Division Patrick A. Campbell Christine A. Loseke
Rob E. Caples Marcee A. Brownlee
Jessica Kerkhofs

LINCOLN
The Community of Opportunity

MAYOR COLEEN J. SENG

lincoln.ne.gov

August 9, 2006

Tom Ostdiek
Fitzgerald Schorr Bartmettler
& Brennan, P.C., L.L.O.
13220 California Street, Suite 400
Omaha, Nebraska 68154

Re: Lincoln Lumber Company, CI 06-1034

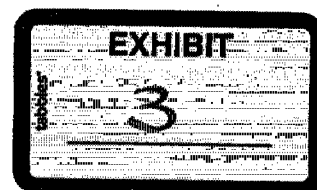
Dear Tom:

This is a follow-up to your letter dated July 19, 2006. Your letter indicates that LLC would like the City to make those concessions offered in our July 17th letter and would also like the City to make several new changes. If I have misunderstood your position, please let me know. Otherwise, the City will make those concessions previously discussed. The new changes requested in your letter are addressed below.

I understand that Mr. Hamill would like to build and maintain an open-wall structure in the permanent easement area. The City is unwilling to relocate the storm sewer to accommodate this structure but as stated in the Petition for the Appointment of Appraisers, LLC is free to use the permanent easement for railroad purposes or for other surface uses except the construction thereon of permanent buildings. Although it is unclear from your description, if the proposed structure is something less than a permanent building in nature and not directly on top of the storm sewer, the City would not oppose its construction. Of course LLC's use of the permanent easement area would be subject to the City's right to replace, maintain and operate its storm sewer. Even so, the City may not have to access the storm sewer for many years. Today storm sewers are designed and constructed to last up to 100 years. However, there is no guarantee this storm sewer will last that long.

The City will agree to cover the storm sewer as shown on the plans, which is 18 inches or more in most places. Placing more fill will cause interior ponding issues. The City will not design or build a retaining wall in Whittier. A retaining wall is not related to or necessary for the storm sewer. Any drainage problems in this area are the result of topography, not design by the City of Lincoln. If Mr. Hamill is concerned that his retaining wall may create future drainage problems, he should consult an engineer to aide in its design.

The City will not remove the storm sewer pipe on the north side of the tracks (assuming you are referring to 15" plastic pipe between 23rd and 24th). A review of City records indicate this is a

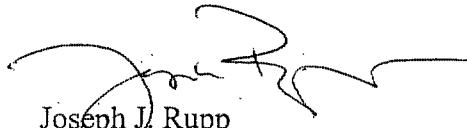


private system and as such belongs to LLC. The pipe is connected to an inlet owned by the City but the pipe itself is not owned or maintained by the City.

Lastly, the City is unwilling to remove the cement dock. The cement dock is owned by LLC and sits on top of the City's sanitary sewer (according to LLC). This has nothing to do with the storm sewer project. Further, the City will not release Mr. Hamill from liability for damage to the sanitary sewer resulting from the cement dock's removal.

If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe Rupp", with a long horizontal flourish extending to the right.

Joseph J. Rupp
Assistant City Attorney

cc: Ben Higgins
Holly Lionberger